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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant,

vs.

NITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; AND RYDER TRUCK LINES, INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

IEF IN OPPOSITION TO MOTIONS TO AFFIRM.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

Pursuant to Rule 16(4) of the Rules of this Court appellant, Consolidated Copperstate Lines (Copperstate) files this its brief and reply to arguments set forth in Motions to Affirm filed by the various parties hereto.

ARGUMENT.

The Interstate Commerce Commission (Commission) and United States of America (U. S.) assert that appellant's argument concerning the Commission's failure to consider the testimony of public witnesses is a matter of form rather than substance. This same argument is made in various ways by other parties. Even if the Commission considered the evidence of shipper witnesses in determining the question of "need" in the Section 207* case, as is asserted, that does not as is then argued determine the need "in both cases". Under Section 207 "need" is determined in the context of a finding of "public convenience and necessity". In a Section 5** proceeding "need" is determined in the context of a finding of "public interest". These distinctions are statutory, substantive and not matters of form.

There are obvious inconsistencies between the criteria considered by the Commission in determining the issues of "public interest" and "public convenience and necessity" raised in the instant case and in *Consolidated-Control-Southern Plaza,* 104 MCC 194. Contrary to the assertion in the Motion of the Commission and the U. S., possible participation by Consolidated in allegedly violating the Interstate Commerce Act was in fact an issue in that case (see 104 MCC at 210). That was not the only or overriding consideration in the *Consolidated* case and it was arbitrary for the Commission to consider it so in the instant matter.

The reference to Copperstate's "willful and defiant disregard for regulation" is out of context. Prior to making that statement the Commission itself indicates that the illegal operation may have continued for a brief period following the granting of temporary authority and then

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* 49 U. S. C. § 307.

** 49 U. S. C. § 5.

refers to an inference upon which it then based subsequent findings (J. S. app. 41).

In fact the Commission's discussion of the "willful and defiant disregard for regulation" and of Copperstate's intention to continue unlawful movements is predicated on a single question and answer. It may be appropriate at this point, since so much is made of it and despite the absence of a printed record, to apprise this Court of the source of the finding upon which the Commission has arbitrarily based its entire decision. During the cross-examination of one of Copperstate's witnesses concerning the matter, he was asked:

> "If the purchase application is granted, do you propose to continue that type of operation?
> A. No sir. That is the reason we filed a certificate.
> Q. I said the purchase, just the purchase.
> A. All right.
> Q. Do you propose to continue that sort of operation?
> A. No sir.
> Q. You don't?
> A. No sir". (Transcript p. 746.)

Following that it became apparent that the witness was considering the question in the light of the Sub 21 application. This is clear from the answer "No sir, we would move it from Baton Rouge directly into Houston" (Transcript p. 746). The witness asserted that he would do this under the purchase application alone, but that he was confused about the line of questioning (Transcript p. 747). Finally, the following question was posed, "If the Section 5 application were granted, and you were permitted to purchase the England authority, Louisiana and Texas Companies, do you propose to continue to pick up shipments at Baton Rouge and move them via New Orleans to Houston?" The answer was, "Yes until we get a ruling from the Commission that it's not illegal" (Transcript

p. 747). Further, when asked whether the witness had consulted his counsel as to whether this operation was legal, his answer was, "This didn't come up until the other day. I haven't inquired yet with him, no" (Transcript pp. 747-748). Nowhere did the witness make the statement attributed to him. Instead the record shows that the issue was raised at the hearing for the first time* and that the exchange between the witness and counsel did not evidence any intention to operate in an unlawful manner.

In each motion to affirm it is asserted that the Commission arrives at its decisions on a case by case basis depending upon the facts in each. That of course is proper as a general rule. However, the facts in each case must be weighed in accordance with applicable statutory provisions which clearly differentiate between "public interest" and "public convenience and necessity" and an administrative agency cannot ignore the established criteria for determining each. While facts may change from case to case the statute and criteria to be applied do not. The Commission's decision in the instant matter is arbitrary because that is its effect.

Respectfully submitted,

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* In addition this short exchange should be considered in light of the fact that England's management has ostensibly obtained an opinion from a Commission representative which they construed as permitting the operation in question (J. S. App. 78).

PROOF OF SERVICE.

I, David Axelrod, attorney for Appellant Consolidated Copperstate Lines, and a member of the bar of this Court, do hereby certify that I have this day served its Brief in Opposition to Motions to Affirm upon the parties to this action by mailing copies thereof to the Solicitor General, Department of Justice, Washington, D. C. 20530, as service upon the Appellee United States of America; to Robert W. Ginnane, Esquire, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, as service upon Appellate Interstate Commerce Commission; to Dennis G. Lyons, 1229 Nineteenth Street, N. W., Washington, D. C. 20036, as service upon Strickland Transportation Co., Inc., intervening Plaintiff below; to Phineas Stevens, Esquire, Butler, Snow, O'Mara, Stevens & Cannada, Suite 700, Petroleum Building, Post Office Box 22567, Jackson, Mississippi 39205; and to James Wrape, Esquire, and Robert E. Joyner, Esquire, Wrape and Hernly, 2111 Sterick Building, Memphis Tennessee 38103, as service upon Appellee Arkansas-Best Freight System, Inc., and Gordons Transports, Inc., intervening defendants below; to Reagan Sayers, Esquire, and Clayte Binion, Esquire, Rawlings, Sayers & Scurlock, Century Life Building, P. O. Box 17007, Fort Worth, Texas 76102, attorneys for Appellee Ryder Truck Lines, Inc., intervening defendant below; to Lawrence A. Winkle, Esquire, Braswell Motor Freight Lines, Inc., P. O. Box 3989, Dallas, Texas 75208; and to M. Ward Bailey, Esquire, and T. S. Christopher, Esquire, Christopher & Bailey, 2412 Continental Life Building, Fort Worth, Texas 76102, as service upon Appellee Braswell Motor Freight Lines, Inc., intervening defendant below; to Mert Starnes, Esquire, James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701, as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., interven-

ing defendants below; to Leroy Hallman, Esquire, and William E. Livingstone III, Esquire, Phinney, Hallman, Pulley & Livingstone, 4555 First National Bank Building, Dallas, Texas 75202, as service upon Appellee Herrin Transportation Company, intervening defendant below; and to Maurice E. Hibbert, Esquire, and Warren N. Grossman, Esquire, Knapp, Gill, Hibbert & Stevens, 825 City National Bank Building, 606 South Olive Street, Los Angeles, California 90014; to W. D. Beatenbough, Esquire, Vice President-Traffic, Ryder Truck Lines, Inc., P. O. Box 2408, Jacksonville, Florida 32203; to Charles L. Ford, Esquire, Texas Railroad Association, P. O. Box 1767, Austin, Texas 78767; to Rollo E. Kidwell, Esquire, P. O. Box 10125, Dallas, Texas 75207; to Charles D. Matthews, Esquire, P. O. Box 47407, Dallas, Texas 75247; to Hugh T. Matthews, Esquire, Brooks, Montgomery & Matthews, 630 Fidelity Union Tower, 1507 Pacific Street, Dallas, Texas 75201; to Franklin H. Wilson, Esquire, McCutchen, Black, Verleger & Shea, 615 South Flower Street, Los Angeles, California 90017; and to Messrs. Russell & Schureman, 1545 Wilshire Boulevard, Los Angeles, California 90017, as additional service upon various of the aforesaid Appellees, intervening defendants below; and I do further certify that such mailing was made by air mail, postage prepaid, in the case of addressees having addresses other than in Chicago, Ill.

Dated April 16, 1969.

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